Document:-

A/CN.4/SR.1999

Summary record of the 1999th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-

1987, vol. I

pose was to serve as a deterrent. There would thus be little point in making unintentional conduct criminal. The requirement of intent could perhaps be embodied in draft article 3.

23. He agreed that there was a place in the code for the exception of self-defence, but only in very limited circumstances. As had already been noted, if, for example, a leader of State A ordered an armed attack on State B in the exercise of the right of self-defence under Article 51 of the Charter of the United Nations and in response to an earlier act of aggression by State B against State A, then State A would not be regarded as an aggressor and the leader who had ordered the action carried out in the exercise of the right of self-defence could not be tried under the code on the ground that he had ordered or committed an act of aggression. The question, therefore, was how properly to circumscribe the exception of self-defence. On the other hand, if it were decided to implement the code by means of an international criminal jurisdiction, he would be far readier to leave the question of the application of such defences to that jurisdiction.

24. Speaking as Chairman and referring to the timetable for the consideration of the present item of the agenda, he said that the Special Rapporteur might wish to sum up the discussion on the topic in the course of the following week.

Following a brief procedural discussion, it was so agreed.

The meeting rose at 12.45 p.m.

1999th MEETING

Tuesday, 19 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, M. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 11[5] (*continued*)

1. Mr. RAZAFINDRALAMBO said that, as he was speaking near the end of the debate, he would confine himself to giving his opinion on certain questions which he found important and making a few drafting suggestions.

2. The first question was that of the nature and legal character of an offence against the peace and security of mankind. While it was difficult to include in a general definition all the characteristic elements of the various categories of offence to be covered, the definition proposed by the Special Rapporteur in draft article 1, which referred to the list of offences to be included in the code, might provoke criticism and be denounced as the easy way out. Many speakers had stressed the disadvantages of referring to a list, since, in view of the principle *nullum crimen sine lege* and the rigorous nature of criminal law, such a list ought to be exhaustive, whereas the development of international criminal law made it impossible to rule out subsequent modification. The Special Rapporteur himself did not exclude the possibility that other offences might be added to the list if they came to be regarded as criminal according to the general principles of law recognized by the community of nations (draft article 8, para. 2). Consequently, if it was recognized that other offences might subsequently be added to the list, they would have to satisfy precise criteria defined in advance in the code, since otherwise legislators would be obliged to resort to the dubious method of proceeding by analogy.

3. Moreover, the meaning and scope of some of the general principles stated in chapter I of the draft, such as the exceptions to the principle of responsibility (draft article 9), depended on the basis of responsibility itself, that was to say the constituent elements of the offence, the sum of which generated that responsibility. He therefore believed that the draft code should contain a provision setting out the constituent elements of an offence against the peace and security of mankind. The Commission already had a definition of an international crime in article 19 of part 1 of the draft articles on State responsibility,[6] which there was all the more reason not to disregard because, in the great majority of cases, the responsibility of the State was perceived behind the responsibility of its agents. That definition had the merit of containing the moral and the material elements of criminal responsibility, and the third, or legal, element could be added without difficulty, since it resulted from a breach of the conventions in force or of the laws and customs of war.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1992nd meeting, para. 3.

[6] See 1993rd meeting, footnote 7.

4. Taking article 19 as the starting-point, an offence against the peace and security of mankind could thus be defined in the following terms:

> "A deliberate breach of an international obligation essential for the protection of fundamental interests of the international community, constituted by acts calculated to endanger world peace, to cause intentional harm to the human person or status, or to infringe the laws and customs of war, is an offence against the peace and security of mankind."

That definition was broadly similar to the one already proposed by some members. By emphasizing the intentional nature of an offence against the peace and security of mankind, it would clarify the scope of certain exceptions to the principle of responsibility based on the absence of criminal intent. Of course, it would be for the Drafting Committee to put the text into final form.

5. The second question—that of the content of the code *ratione personae*—had been provisionally settled by the Commission's decision to confine the draft to the criminal liability of individuals,[7] pending replies from Governments to its request for opinions concerning the criminal responsibility of States. Until those replies had been received, the Commission should be cautious in its choice of terms relating to the content *ratione personae*. It should not give the impression that only individuals could commit offences against the peace and security of mankind; in that respect, the former text of draft article 3 seemed preferable. Moreover, as he had already mentioned, in the great majority of cases the responsibility of the State for offences against the peace and security of mankind was engaged by individuals acting as its agents. To borrow an expression from civil law, it was "responsibility for the act of another", or responsibility of the "principal", which gave rise to a civil action before a criminal court. Thus the Commission should also concern itself with the interests of the victims, by including a provision which would supplement criminal responsibility with the corresponding civil responsibility and which, besides regulating public prosecution, would regulate the conditions for a civil action. Such a provision seemed all the more necessary because, according to the general principles of criminal law, justifying circumstances, while they eliminated criminal responsibility, had no effect on civil responsibility. It remained to be seen whether the Commission wished to adopt such a rule; if it did, it should be framed in a special provision devoted to civil actions.

6. The third question—that of the application of the code with respect to time—had two aspects: first, the non-applicability of statutory limitations to the offences; and secondly, the non-retroactivity of criminal law. Generally speaking, he endorsed the Special Rapporteur's positions on those points, as set out in draft articles 5 and 8.

7. With regard to statutory limitations, the Special Rapporteur seemed mainly concerned with their non-applicability to prosecutions, leaving aside the question of penalties. It was true that that question could be dealt with in a later part of the code devoted to the theory of punishment; but it might be asked whether it would not be better placed among the general principles. Moreover, since general criminal law recognized the principle of the interdependence of public prosecutions and civil actions, it might be well to specify that civil actions were not subject to statutory limitations either. The confirmation of that principle would be of great importance in connection with State responsibility.

8. As to the principle of non-retroactivity, its application in international law was not as easy as in general criminal law. For international law was by nature a declaration and recognition of the customary rule, and in principle it only established the existence of a rule of law: it did not make conventional law. Thus one could understand the concern which had led the Special Rapporteur to draft paragraph 2 of article 8, leaving it to the Drafting Committee to decide whether that principle should be embodied in a separate paragraph.

9. The fourth question—that of the competent jurisdiction and the *non bis in idem* rule—was closely connected with that of the content of the code *ratione personae*. For if the criminal responsibility of the State was eventually to be included, it was difficult to imagine that the implementation of the code could be entrusted to national courts. It was true that, for the time being, the Commission had to work on the basis of the criminal responsibility of the individual; but, in order not to prejudge the solution finally adopted for that problem, it should be indicated at the beginning of draft article 4 that that provision was without prejudice to the establishment of an international criminal jurisdiction.

10. The competence of national courts to try offences covered by the code raised several problems. The first was the question whether the obligation under article 4 to try the alleged offender or to extradite him included his prior arrest, or whether, as had been proposed, it would be sufficient to require that the person concerned was in the territory of the State—whether its real territory or its fictional territory, such as the territorial sea or a ship. The second problem was the plurality of national jurisdictions and its corollary, the *non bis in idem* rule. The statement of that rule in a provision of the code could only be supported. In draft article 7, however, it would be better to speak of punishment for an act, rather than for an offence, since the term "offence" might cover acts which were not necessarily identical with those for which the alleged perpetrator of the crime had already been prosecuted before a court of another State.

11. The first option open to the State being trial, the second was extradition—clearly formal, rather than disguised, extradition. But given the diversity of judicial systems, the principle of extradition might be opposed by some States; hence the importance of draft article 6 on jurisdictional guarantees. Once the principle of those guarantees was accepted, it appeared that extradition upon application by the State in which the offence had been committed should be made mandatory. On the other hand, it did not seem possible to let the alleged offender choose his own judge, since that would be contrary to the peremptory character of the rules of jurisdiction. To cover cases of multiple applications for extradition, an order of priority seemed desirable; but that question, like other questions of procedure, could

[7] *Yearbook . . . 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

be dealt with in a protocol. It would also be well to include, as advocated by Mr. Sreenivasa Rao (1994th meeting) and Mr. Ogiso (1997th meeting), a provision specifying that the crimes listed in the code were not to be regarded as political crimes, as was provided in article VII of the Convention on the Prevention and Punishment of the Crime of Genocide. Lastly, the alleged offender should be denied the right of asylum, in accordance with paragraph 7 of General Assembly resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

12. The fifth question was that of the extent of responsibility. It was a complex notion, which presupposed that the constituent elements of the crime were all present and established, the absence of one of those elements being sufficient to nullify criminal responsibility. In draft article 9, the Special Rapporteur had proposed various exceptions to the principle of responsibility. Those exceptions could be divided into two groups, according to whether they were considered *in personam* or *in rem*. The first group comprised physical or moral coercion and error of law or of fact, to which insanity might be added; those were causes of non-responsibility due to the absence of criminal intent. The second group consisted of justifying circumstances: self-defence, state of necessity or *force majeure*, and the order of a legitimate authority such as a Government or a superior. It might therefore be advisable to draft two separate provisions entitled "Causes of non-responsibility" and "Justifying circumstances", the second of which, unlike the causes *in personam,* nullified civil responsibility. The causes of non-responsibility and the justifying circumstances would probably not apply equally to all categories of offences against the peace and security of mankind; but it seemed difficult to indicate in article 9 to which category of offences any particular notion affecting criminal responsibility applied: it would be for the court to appraise such application.

13. Some members of the Commission considered that the concepts of attempt and complicity should be placed among the general principles, since they were concepts of a general character which affected the degree of criminal responsibility. The autonomy of international criminal law did indeed require that the court should not be bound to refer to concepts of internal law in that context, but should have special rules, even if they must be based on principles of general criminal law. It would be well, however, if, in accordance with contemporary trends in criminal law and as proposed by the Special Rapporteur in draft article 14 as submitted in his fourth report (A/CN.4/398, part V), attempt and complicity were treated as separate offences with respect to the penalty applicable.

14. He had not taken up certain provisions of the draft articles because, in the main, he had no objection to them. On the question of the implementation of the code, he recognized that, if it took the form of a multilateral convention, its provisions would be immediately enforceable and directly applicable by national courts, without any need to incorporate them in national law. Nevertheless, he was inclined to support the proposal that the final clauses should affirm the obligation of States parties to the convention to take the necessary legislative measures to ensure the application of its provisions and, especially, to apply effective penal sanctions. It would also be useful to confirm the principle of the obligation of States to co-operate, as stated in General Assembly resolution 3074 (XXVIII) (see para. 11 above).

15. Mr. BARSEGOV said that, at the present stage, he wished to make a few remarks on the question of intent and to comment on statements by other members.

16. For the particular category of crimes which were offences against the peace and security of mankind, it was important to give a proper definition of intent and motive, since otherwise crimes might go unpunished. But it did not appear that the Commission had really adopted that course. For to conclude, as the Commission had done in its report on its thirty-eighth session, that "motive was essential for the characterization of an act as a crime against humanity",[8] was not in conformity with the Convention on the Prevention and Punishment of the Crime of Genocide or with the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Similarly, the definition of the content of a crime against humanity given by the Special Rapporteur in his fourth report (A/CN.4/398, para. 25) was imprecise, and wrongly assimilated intent to motive. To determine the intent was in fact to determine the purpose for which the act was committed, to determine whether its author consciously wished to achieve a criminal result or whether that result had occurred against his will. Motive, on the other hand, concerned the reasons and considerations which had led the author of the act to commit it. It was true that the concepts of intent, premeditation, motive and purpose partly overlapped and could easily be confused. Nevertheless, they produced well-defined legal consequences, so that it was important to determine the place of intent and motive in the whole group of offences against the peace and security of mankind.

17. In criminal law, intent and motive, as subjective factors, formed part of the elements serving to characterize the act, together with the object and the subject of the act, the criminal consequences and the links of cause and effect. But was it admissible to transpose all those elements automatically to the definition of the offences covered by the code, without taking account of the specificity of each of them? Were intent, and especially motive, necessary elements for establishing criminal responsibility and determining its limits? In international law, doctrine cast doubt on the possibility of that transposition, and even the writers who accepted it did so with reservations. For instance, in his manual of public international law, Mr. Reuter said:

> The first condition for international responsibility of the State is the existence of a wrongful act, that is to say an act contrary to the international obligations of that State.[9]

The content of the international obligation violated, the wrongful act and the extent of the violation were defined by the result. Mr. Reuter further stated:

[8] *Yearbook . . . 1986*, vol. II (Part Two), p. 45, para. 88.

[9] P. Reuter, *Droit international public*, 5th ed. rev. (Paris, Presses Universitaires de France, 1976) (*collection Thémis*), p. 218.

...some obligations are defined by the final result of the operation to which they relate . . . the object of other obligations is certain conduct with a view to a result;[10]

The breach of an international obligation was linked, in the first case, to the result; in the second case, it was linked to the incompatibility of acts which must be clearly defined. But in both cases the elements were objective, or could be objectively established. With regard to the subjective elements, Mr. Reuter observed:

Jurisprudence has been led to introduce subjective elements into the mechanisms of responsibility to a certain extent.

Thus, in certain cases, jurisprudence cannot disregard the intentions which directed a punishable act.[11]

18. In the practice of international law, it should be noted that, of all the crimes against humanity, genocide was the only one in the definition of which the word "intent" was used, namely in article II of the Genocide Convention. In its resolution 96 (I) of 11 December 1946 on the crime of genocide, the General Assembly had affirmed that genocide was a crime under international law "for the commission of which principals and accomplices . . . whether the crime is committed on religious, racial, political or any other grounds—are punishable": "intent" was not taken into account. After a historical interpretation of the preparatory work which had led to the drafting of the Genocide Convention, he added that the word "intent" had been embodied in the text of that instrument under the regrettable influence of certain States which had wished to limit its field of application, and that it was interpreted therein as a subjective element necessary for the definition, without which there could be no crime. It need hardly be said that the efficacy of the Convention was thereby considerably reduced.

19. Examining the question of intent as a constituent element of the definition of the crime of genocide, the Special Rapporteur, in his fourth report (*ibid.*, para. 29), started from the principle that genocide could be considered "from two angles: its purpose and the number of victims involved". But in the case of genocide, as in that of *apartheid*, it was not admissible to go by the intention of massive and systematic destruction. For the mass nature of the crime presupposed precisely the purpose of destroying a group of persons, even if genocide was considered from its first manifestations, when a group was partly eliminated or when isolated but systematic murders were committed. Thus it could not be accepted that the gravity of genocide could be determined only by the subjective intent of the perpetrator, for that would leave him a loophole to escape responsibility. The history of the crime of genocide, in all known cases without exception, showed that authors of that crime had always publicly denied intent—which was expressed in secret documents in veiled terms such as "the final solution"—arguing against the evidence of the facts that they had acted in the interests of the State or of national security, and never hesitating to destroy the evidence of their responsibility. But it was the facts that presupposed the intent, which manifested itself in the result and the massive and systematic nature of the crime, in other words by elements which could be objectively established. To say that the essence of a crime against humanity was its intent would be to deprive the definition of its essential constituent and the rule of law of its main social function, since the danger of genocide lay precisely in the result and not in the intention.

20. It did not seem necessary to raise the question of intent in order to show the need for a rigorous definition, for objectivity and for sound administration of justice to be assured. It was true that premeditation or intent constituted a normal element in ordinary criminal law, in the sense that inattention or negligence could explain how an act which might have been regarded as a crime had really been committed without intent to commit it. But how could it be accepted, for example, that the use of nuclear weapons of mass destruction had been ordered by negligence or inattention, when the consequences were known to everyone? How could it be accepted that millions of people had been murdered by negligence?

21. In the case of genocide, as in that of *apartheid*, the acts in question, far from being spontaneous, were planned and directed to specific purposes: for that reason they were punishable. Although they were acts of mass destruction organized by a State, directed by a Government and executed by the army, the police, the gendarmerie or criminal organizations, the criminal conduct of the individual who had committed a crime against humanity was not thereby eliminated, and his intention was none the less evident. Besides the intentions and purposes of the State which committed a crime against humanity, there could certainly be private intentions and motives of the individuals who were its executives. But the intentions of those executing the will of the State could only be added to the general political intention of the State itself: they could not replace it. To maintain the contrary would be absurd, since the massive elimination of people could then be presented as a series of isolated murders committed by individuals in their private capacity. That would be a denial of genocide and was, incidentally, the thesis of the lawyer defending Klaus Barbie in the trial at Lyons. What was more, experience showed that a State having organized genocide could, if political events turned to its disadvantage, show its will to punish—or to appear to punish—some particular person as an individual criminal, in the hope of evading the political and criminal consequences of the act and the accusation of genocide.

22. The main purpose of the definition of the crime was to make it possible to establish a correspondence between, on the one hand, the manifestations and content of the act committed and, on the other, the elements of the definition of the crime provided in the corresponding rule of law. In establishing that correspondence between the individual act and genocide as a crime against humanity, it was important to take account of all the circumstances in which the act had taken place. In other words, to define the responsibility of a given individual it was necessary to take into consideration the place, the act itself and the way it fitted into the general crime of genocide. The act of the individual must therefore be compared with the acts of others responsible for the crime of genocide. For it would never be possible to define the crime of genocide by

[10] *Ibid.*, p. 37.

[11] *Ibid.*, p. 220.

establishing the existence of murders as isolated, independent acts. If the acts were considered as a whole, however, it became possible to isolate a common element, namely the elimination of members of a given group.

23. It followed that the question of complicity was of particular importance as an essential element of crimes against humanity such as genocide and *apartheid*. For those crimes, the existence of an objective link between the criminal act and its consequences provided an objective basis for criminal responsibility, by making if possible to establish not only that the consequences were due to the incriminated act, but also that they resulted from a deliberate intention. In other words, the intent was determined by the establishment of a group of identical acts, organized and directed from a single centre. To commit an act characterized as a crime against humanity unintentionally, by inadvertence, negligence or error, was, by the very nature of the act, impossible. Deliberate intention and motive were basic elements of the crime of genocide and were shown objectively by the establishment of the acts. In the case of genocide, it was even sufficient to establish the act and its consequences; there was no need to establish intent. In any case, the burden of proof should certainly not be on the victims of the crime.

24. All those comments on intent as a subjective element in the definition of the crime of genocide were also applicable to the crime of *apartheid*. In the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, that crime was defined, in article II, as

> inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

There was no mention of intent. It was only in one of the elements of the definition of the crime of *apartheid*, in article II, subparagraph (*b*), that the word "deliberate" appeared:

> deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

All the other elements of the definition of the crime consisted of the description either of concrete acts, or of acts committed in order to obtain particular results, that was to say acts which could be objectively established. As to motive, article III of the Convention provided that:

> International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State . . .

That article clearly ruled out all possibility of invoking any motive to deny or limit responsibility. That was how the question of motive should be treated in the draft code of offences against the peace and security of mankind: such treatment was absolutely imperative if the action taken against genocide, *apartheid* and other crimes against humanity was to be effective.

25. The Special Rapporteur and other members of the Commission were obviously wondering whether it was possible to extend the criterion of intent to all crimes against humanity and all offences against the peace and security of mankind. Not only was that procedure unjustified, but the questions of intent and motive should be settled and interpreted in the draft code on the basis of the international instruments which defined the scope of the crimes, since otherwise the Commission would be adopting a subjective perception of certain elements of them.

26. It should also be noted that the definition of the crime of genocide partly corresponded to that of the crime of *apartheid*, and that the link between those crimes was clearly stated in the preamble to the *Apartheid* Convention, which said that

> . . . in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of *apartheid* constitute a crime under international law . . .

Similarly, in a whole series of resolutions, the General Assembly had characterized the policy and practice of *apartheid* as crimes against humanity, going so far as to ask whether there was not a substantive link between the crime of *apartheid* and the crime of genocide. Accordingly, an *ad hoc* Working Group of Experts, consisting of international lawyers, had applied the Nürnberg Principles[12] to the crime of *apartheid* and had recommended that the Convention on the Prevention and Punishment of the Crime of Genocide should be revised to include the crime of *apartheid*.

27. From those considerations, a number of conclusions could be drawn. The Commission should not follow the definition of genocide by introducing the element of intent into the definition of all offences against the peace and security of mankind; on the contrary, it should interpret the element of intent, as found in the Convention on the Prevention and Punishment of the Crime of Genocide, not as an element necessary for proving the will of the criminal to annihilate a people, but as a pursued purpose which could be established objectively in the light of the acts committed. If the Commission adopted the criterion of intent, it would probably be a presumption of guilt, but the burden of proof would still be on the victim. Consequently, the draft code should include a provision based on article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which excluded all possibility of invoking any motive to justify that crime.

28. The Commission's work on the draft code had originated in the Charter of the Nürnberg Tribunal[13] and in General Assembly resolution 177 (II) of 21 November 1947 on the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. That Charter had taken up the fundamental ideas set out in instruments such as the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land,[14] the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,[15] and the 1928 Kellogg-Briand Pact.[16] Thus the Charter of the Nürn-

[12] See 1992nd meeting, footnote 12.

[13] *Ibid.*, footnote 6.

[14] See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918).

[15] League of Nations, *Treaty Series*, vol. XCIV, p. 65.

[16] General Treaty for Renunciation of War as an Instrument of National Policy, of 27 August 1928 (*ibid.*, p. 57).

berg Tribunal certainly had a solid foundation, although the legal bases must sometimes be evaluated from a historical viewpoint. That was why, since May 1945, the Allies had declared that genocide was an offence against the peace and security of mankind and had subscribed to the principle that persons guilty of that crime must be punished. The post-war trials had provided the first examples of practical application of the rules and principles of international law stated on that subject.

29. While retaining the legal essentials of the Charter of the Nürnberg Tribunal, the draft code should therefore define new parameters, propose solutions depending on qualitatively different elements and take account of the realities of the modern world; and a general part of the code should reflect principles that were in conformity with the current development of international law and the awakening of humanity to those issues, which would be the best guarantee of the code's effectiveness.

30. With regard to draft article 5 as submitted by the Special Rapporteur in his fifth report (A/CN.4/404), it had been said during the discussion that the principle of the non-applicability of statutory limitations should not apply to all offences under the code without distinction, since some of the acts in question came under general criminal law. Other speakers had maintained that offences against the peace and security of mankind should be considered as belonging to a separate category of crimes, to which special legal rules and principles should apply, independently of the correspondence between national laws. On that point, the Special Rapporteur was right to emphasize, in the commentary to draft article 2, the principle of the autonomy of international criminal law, which was the key element for settling the questions that arose in subsequent draft articles, including that of the non-applicability of statutory limitations. It was true that, in internal law, the periods of limitation depended on the gravity of the crime. But in the case in point, in view of the exceptional gravity of the crimes to which the code would apply, the preventive function of the non-applicability of statutory limitations was of special importance; and the discussion had confirmed the rightness of the position taken by the Special Rapporteur in draft article 5.

31. Members of the Commission who still doubted the possibility of proving the guilt of an accused after a certain length of time should consider the example of the Klaus Barbie trial, at which there had been no lack of witnesses and irrefutable evidence had been produced 40 years after the acts in question. It had also been said that the Commission saw that problem from the viewpoint of the past. He saw that comment as an encouragement to re-examine matters even more meticulously, so that the blood-stained past should not later become a nightmare. Pierre Mertens had written that one would have to be blind not to see that the impact of the Nazi crimes made itself felt beyond territorial and temporal frontiers.[17] The purpose of the rules of international law on the subject was precisely to prevent such crimes from recurring in the future, and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity constituted a means of prevention.

32. International law had its own functions and its own lines of progressive development, and in relations between States one could not and must not seek to establish at all costs a strict analogy with the national practice of States. Ulrich Scheuner had said in 1939 that too great an influence of national law on international law would put the latter in danger and that it was sound and salutary for the law of nations not to take root too deeply in national law. According to Scheuner, the strength of the law of nations lay in the common ideas which nations, however different their internal régimes and concepts of law, recognized as necessary and salutary in the sphere of international life.[18]

33. In conclusion, he urged the Commission to fulfil its mandate for the progressive development and codification of international law by confirming the rules in force, strengthening the principle of the non-applicability of statutory limitations to offences against the peace and security of mankind and establishing the obligation of States to take the necessary legislative measures to prevent and punish those offences.

34. Mr. ROUCOUNAS said that he would confine his comments to draft articles 2, 4, 5, 6 and 9 submitted by the Special Rapporteur in his fifth report (A/CN.4/404).

35. In draft article 2, the Special Rapporteur seemed to have been concerned to preserve the autonomy of international law and exclude the possibility of internal law being contrary or indifferent to the code. In reality, besides "characterization", article 2 was also concerned with "incrimination": the object in view was not only to keep clear of internal law, but also to show that the Commission had carefully considered the material basis on which incrimination rested and that it wished to ensure that the law was guaranteed by uniformity. For although it was not for the Commission to tell national legislators how to proceed in applying the code, the interaction between international law and internal law could not be overlooked. For the time being, in the case of an international crime, it was internal law that determined the competent court and the penalty applicable; hence the need to assess that interaction and to preserve it, but also perhaps to make it more explicit by means of a second paragraph, which would specify the effective relationship between the provisions of the code and internal law.

36. With regard to draft article 4, the Special Rapporteur had devoted much attention to the very difficult problem of extradition. First of all, the Commission should take account of the fact that certain acts which would probably be covered by the code, such as genocide, *apartheid* and the hijacking of aircraft, were already incriminated under international conventions in force. It should then consider whether the solutions adopted in those conventions were suited to the needs of the code. At a later stage in its work, it could consider

[17] P. Mertens, *L'imprescriptibilité des crimes de guerre et contre l'humanité* (Editions de l'Université de Bruxelles, 1974), p. 11.

[18] U. Scheuner, "L'influence du droit interne sur la formation du droit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, p. 199.

drafting an annex providing in detail for extradition machinery. For the time being, the Commission should not lose sight of the international agreements already in force on the subject. Paragraph 2 of article 4 might therefore appear unnecessary; it would not be so if the Commission informed the General Assembly that it was willing to study the question of an international criminal jurisdiction if requested to do so. He would be in favour of such action.

37. Should draft article 4 provide that States parties must take the necessary steps to carry out extradition? That was questionable, for in drafting the code the Commission should be as much concerned with the interests of the individual prosecuted as with those of the international community. Extradition procedure included certain guarantees, mainly judicial, which the Commission should endeavour to provide for the accused. Moreover, such a vague provision would probably not induce Governments to take the desired measures; the scope of their international obligations should be more precisely stated.

38. He did not know how far collective and governmental mentalities had evolved over the past 10 years, but he noted that, in the sphere of positive international law, the difficulties raised by extradition were enormous. One way the Commission could overcome those difficulties would be to include in the draft code a provision which, based on existing international instruments, would meet at least two ends: first, it should enable the code to serve as an extradition treaty for States which did not accept the institution of extradition unless it was provided for in a treaty; secondly, it should add the offences covered by the code to the crimes covered by the bilateral or multilateral conventions in force. Of course, the question whether such a provision would be binding or not remained to be discussed.

39. Another solution would be to provide that the perpetrator of an offence against the peace and security of mankind must be extradited regardless of the motive for which he had acted. By that method, which had already been adopted in the Convention on the Prevention and Punishment of the Crime of Genocide and in the 1977 European Convention on the Suppression of Terrorism,[19] the Commission would rule out the exception of the political offence, which was regularly invoked before courts called upon to decide extradition cases. Lastly, the Commission would have to examine the relations between extradition, political asylum and non-discrimination.

40. He approved of the suggestions made by the Special Rapporteur regarding draft article 5 and noted the statement made in the commentary (para. (4)) that "it is not always easy to draw a distinction between war crimes and crimes against humanity". The difficulties were not only practical, but also theoretical and scientific, and they were not confined to article 5. Hence the need for a separate provision on the non-applicability of statutory limitations to the offences covered by the code, and for more consistency and conformity with General Assembly resolution 3 (I) of 13 February 1946 on the extradition and punishment of war criminals and with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

41. It was right that the draft code should contain a provision such as draft article 6, for the Commission should provide Governments with uniform rules on the guarantees to be enjoyed by the accused. Where there was an international instrument already in force, such as the International Covenant on Civil and Political Rights, the Commission should follow its provisions without undue modification, again with a view to consistency. It could also, in the commentary, explain the guarantees accorded by reference to the decisions of the Human Rights Committee: through its study of individual communications and its discussions with the States whose periodic reports it examined, that Committee could provide a pertinent interpretation of the provisions of the Covenant relating to jurisdictional guarantees. Lastly, draft article 6 should be supplemented by a provision ensuring the protection of a detained person from the moment of his arrest.

42. With regard to draft article 9, if the Commission wished to deal with justifying circumstances in that provision, he would prefer not to make any definite pronouncement on the point, since the opinion one might form on it depended on the point of view adopted and the legal system considered. As a general rule, justifying circumstances were enumerated exhaustively, since they nullified the objective elements of criminal responsibility. But it was also true that, in some criminal codes, those circumstances intersected and merged, and were difficult to distinguish from one another. That being so, the inclusion in the draft code of such notions as *force majeure*, state of necessity and coercion, which would not always have the same content in all countries, would make it necessary to accompany the article by a full and precise commentary explaining the meaning attached to the prescribed exceptions.

43. He understood the difficulties encountered by the Special Rapporteur in dealing with self-defence and noted that, in the commentary (para. (1)), he had confined the scope of that notion to the meaning attached to it in Article 51 of the Charter of the United Nations.

44. As to state of necessity, that notion reflected internal criminal codes, but it also included the idea of military necessity, which had been the subject of many provisions, from the 1863 "Instructions" of Francis Lieber,[20] to the 1949 Geneva Conventions[21] and their 1977 Additional Protocols.[22] He noted, however, that the development of that notion had been distinctly limited and that recent texts referred only to "imperative" military necessity. Again, a study of the jurisprudence of military courts showed that state of military necessity was not accepted as a justifying circumstance. The Commission should therefore pronounce on the content of that notion.

[19] Council of Europe, *European Convention on the Suppression of Terrorism*, European Treaty Series No. 90 (Strasbourg, 1977).

[20] *General Orders No. 100*, Adjutant General's Office, 1863, reissued as *Instructions for the Government of Armies of the United States in the Field* (Washington (D.C.), U.S. Government Printing Office, 1898).

[21] See 1994th meeting, footnote 7.

[22] See 1992nd meeting, footnote 10.

45. In nearly all the prosecutions of individuals accused of war crimes since the Second World War and, more generally, at international conferences and in codification work, consideration had been given to exoneration from responsibility by reason of superior orders. In the 1954 draft code (art. 4), the Commission had reproduced the provisions of article 8 of the Charter of the Nürnberg Tribunal,[23] adding one phrase based on the findings of that tribunal and relating to the moral choice of the author of the incriminated act. Having regard to the principle and not to the exception, a superior order was not a justifying circumstance. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held at Geneva from 1974 to 1977, some participants had tried to find a solution to that very important question, and the Conference had had before it a text whose object was to specify the right of refusal to obey, the principle of non-exoneration of the accused from criminal responsibility and the exception to non-exoneration. After the rejection of that text, which covered the whole problem—the rule itself and the conditions for admissibility of the exception—two interpretations had been advanced: some participants had held that the law in force remained applicable; others, whose opinion he did not share, had maintained that the way was open to oppose non-exoneration from responsibility by positive law. In those circumstances, it might be asked whether it was sufficient to consider the exceptions, as the Special Rapporteur had done, without examining the problem as a whole; and it might be thought that the Commission should devote a separate article to superior orders, since the code envisaged regulation going beyond humanitarian law and covering a whole range of situations.

46. On the actual substance of the question, he thought there were some cases in which the wrongful order had no bearing on the legal situation of the subordinate; others in which it was contrary to the internal law of the State of which he was a national; and yet others in which it was contrary to international law but not covered by internal law—not to mention the unlikely case in which the internationally wrongful order was lawful at the national level. Mr. Tomuschat (1993rd meeting) had raised the problem—both legal and practical—of the relationship between error and knowledge of the law. No doubt there might be borderline cases which should be discussed: the criminality of military personnel, for example, depended on the notion of proportionality, which was gradually finding a place in the law of war. But where offences against the peace and security of mankind were concerned, it did not seem that the problem of knowledge of the law arose in such an acute form, since the particularly odious nature of the crimes in question could not escape any reasonable person. Legal doctrine and some judicial decisions even spoke of "manifest wrongfulness"; and one writer went so far as to propose the notion of "manifest criminality" as being more flagrant than "manifest wrongfulness".

47. The problem had a second facet: the case in which the order was wrongful and the subordinate, although knowing it to be wrongful, had to obey. It might happen that the author of the incriminated act invoked either ignorance of its wrongfulness and the obligation to obey, or the latter obligation only. True, it was not easy to find national legislation providing only for absolute obedience, and laws generally had more nuances; but that was a further reason why the Commission should consider the exception to the rule of responsibility. On that point, the Special Rapporteur had introduced, in draft article 9, subparagraph (*d*), the reservation of moral choice, a concept used by the Nürnberg Tribunal and reproduced in the 1954 draft code (see para. 45 above). That concept raised serious problems, however. As orders constituted a kind of coercion, the moral choice was not linked to the impossibility of disobeying an order that was in conformity with internal law but contrary to international law, nor to the possibility of deciding to die for not having carried out a wrongful order or to carry out a wrongful order in order not to die. For the subordinate, moral choice meant knowing that he was participating in an international crime when it was possible for him to refuse to obey the order given.

The meeting rose at 1.05 p.m.

2000th MEETING

Wednesday, 20 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Two thousandth meeting of the International Law Commission

1. The CHAIRMAN, declaring open the Commission's 2000th meeting, recalled that its first meeting had been held at United Nations Headquarters, Lake Success, New York, on 12 April 1949 under the chairmanship of Mr. Manley O. Hudson, the members then present being: Mr. Alfaro, Mr. Amado, Mr. Brierly, Mr. Córdova, Mr. François, Mr. Hsu, Mr. Koretsky, Sir Benegal Rau, Mr. Sandström, Mr. Scelle, Mr. Spiropoulos and Mr. Yepes.

2. The Commission's 1000th meeting had been held at the Palais des Nations, Geneva, on 16 June 1969 under the chairmanship of Mr. Nikolai A. Ushakov, the members then present being Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Rosenne, Mr. Ruda,

[23] *Ibid.*, footnote 6.